

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOANNE D. LOHMANN**

Claimant

VS.

**STATE OF KANSAS**

Respondent

AND

**STATE SELF INSURANCE FUND**

Insurance Carrier

Docket No. 1,027,057

**ORDER**

Respondent and its insurance carrier (respondent) requested review of the April 11, 2006, preliminary hearing Order For Compensation entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

The Administrative Law Judge (ALJ) granted temporary total disability compensation paid to claimant by respondent. The ALJ also ordered respondent to pay claimant's medical bills and to provide additional medical treatment for claimant's injuries until further order or until claimant is certified as having reached maximum medical improvement. The ALJ ordered these preliminary benefits without any explanation for how she determined the claim to be compensable. Presumably, she accepted claimant's testimony that she was on her way to conduct a surprise inspection of Ingalls School.

Respondent argues that claimant's injury did not arise out of and in the course of her employment. Respondent asserts that more likely than not, claimant was not on her way to inspect Ingalls School on the date of the accident. However, in the event claimant was going to inspect the school, she had a dual purpose in going to Ingalls School in that she was transporting her son to school. Respondent asserts that even if claimant was not going to inspect Ingalls School, she still would have transported her son to school. Therefore, claimant's case is not compensable.

Claimant argues that the ALJ's Order for Compensation should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant is employed by the Kansas Department of Health and Environment (KDHE) as a health inspector. She travels to restaurants and schools, where she performs food safety inspections. She also on occasion inspects hotels when they need a license or if there has been a complaint. KDHE provides her with an automobile and other equipment needed for the inspections, such as thermometers, hard hats, cameras, and flashlights. She carries this equipment in the state vehicle.

On September 14, 2005, claimant contends she planned to inspect Ingalls School, which is the school attended by her five-year-old son. She also testified that she was going to speak to her son's class about her job as her son's "show-and-tell." Her son was riding in the car with her, even though this was prohibited by KDHE and policies of respondent. While claimant and her son were en route to the school, they were involved in an automobile accident, and both she and her son were seriously injured.

Claimant's supervisor, Don Parsons, testified that inspectors have great latitude in setting their inspection schedules. They are allowed to conduct inspections as they see fit as long as the required number of inspections are held per day or per week. Claimant testified that inspections of schools were normally held close to the beginning of the school year. She also said these inspections were "surprise" inspections, and school personnel were not told in advance when the inspection of their facility was scheduled. Therefore, no one except claimant knew that she planned to inspect Ingalls School on the morning of September 14, 2005, other than her husband. Claimant testified that she always told her husband her travel plans, and he testified that he knew she planned on inspecting Ingalls School on the morning of the accident. Claimant also admitted that she was not expected in her son's class for the "show-and-tell."

Claimant testified in a deposition taken March 27, 2006, that she had a planner at her home where she "always wrote down kind of where [she] was going each day."<sup>1</sup> She said she had a follow-up scheduled at the grade school in Sublette on the day of the accident, and she planned on going to the Ingalls School because it would have been on the way to Sublette. At the preliminary hearing held a few days later, a copy of her planner was introduced as an exhibit. There is no indication on her planner that claimant was going to inspect Ingalls School on September 14, but there is a note that she was planning to go to Sublette. However, claimant testified at the preliminary hearing that she wrote down only her scheduled appointments and did not write down those inspections that were a surprise.

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<sup>1</sup>Lohmann Depo. (Mar. 27, 2006) at 17.

Claimant admitted that the most direct route to Sublette was not through Ingalls. However, she testified she often went through Ingalls on her way to Sublette because her husband works in Ingalls and would sometimes fix tires that would go flat on her state vehicle.

There is testimony from claimant, Mr. Parsons, and Lanning Bollacker concerning claimant's son being in the State car at the time of the accident. Claimant testified that Mr. Parsons had given her permission to have her son in the car with her. Mr. Parsons testified that he told claimant soon after she started working that taking her son to day care in the state vehicle would be against KDHE and state policy. Mr. Bollacker, who is claimant's pastor, testified that during a visit he and Mr. Parsons had with claimant in the hospital, he overheard Mr. Parsons tell claimant not to worry about her son being in the car at the time of the accident. Mr. Bollacker testified that Mr. Parsons told claimant, "We've talked about that in the past."<sup>2</sup> Mr. Parsons denies this conversation took place and said that Mr. Bollacker was not present during his conversation with claimant in the hospital. Regardless, having her son in the car is not fatal to this claim. She was not performing a prohibited act. Rather, claimant was performing a permitted business function, driving to an inspection site, in a prohibited manner by having her son with her. "If an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment."<sup>3</sup>

Respondent argues that it is more probably true than not that claimant did not plan on inspecting Ingalls School on the date of the accident but was simply taking her son to school before traveling to Sublette. Respondent notes that the timing of the events of September 14 indicates that the trip to Ingalls School was to accommodate her son's school schedule and not her work schedule. Her son needed to be at school at 8:00 a.m. The accident occurred at 7:45 a.m. Claimant admitted that she had taken her son to school about ten times during that school year. She said her husband often had to be at work before 7 a.m., and those days she would take her son to school. However, claimant also testified that her father and her sister would also take her son to school. On the date of the accident, claimant's husband went to work at about 6 a.m.

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<sup>2</sup> Bollacker Depo. at 8.

<sup>3</sup> *Hoover v. Ehrsam Company*, 218 Kan. 662, Syl. ¶ 2, 544 P.2d 1366 (1976). See also *Servantez v. Shelton*, 32 Kan. App. 2d 305, 81 P.3d 1263, rev. denied 277 Kan. 925 (2004).

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker's employment depends on the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>6</sup>

But K.S.A. 2005 Supp. 44-508(f) provides, in part, the following:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.

K.S.A. 2005 Supp. 44-508(f) "bars an employee injured on the way to or from work from workers compensation coverage."<sup>7</sup> "The rationale for the 'going and coming' rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment."<sup>8</sup>

The Act specifically recognizes both a "premises" and a "special risk" exception to the general rule. But case law creates other exceptions, including when travel is an

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<sup>4</sup> *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

<sup>5</sup> *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 502, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

<sup>6</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>7</sup> *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 655, 970 P.2d 828 (1995).

<sup>8</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

integral or inherent part of the job, when travel is for a special purpose, and when employees are paid for their travel time and/or expenses.

In *Messenger*,<sup>9</sup> the Kansas Court of Appeals applied an exception to the going and coming rule that allows workers compensation coverage where travel on public roadways is an integral or necessary part of the employment. An accident that occurred when Mr. Messenger was returning home from a temporary work site was held compensable because he was required to travel and provide his own transportation, he was compensated for his travel, and both Mr. Messenger and his employer benefitted from that travel arrangement. In holding that the going and coming rule did not apply, the Court of Appeals stressed the benefit that the employer derived from the travel arrangement.

Kansas has long recognized one very basic exception to the “going and coming” rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.<sup>10</sup>

In *Kindel*, the Kansas Supreme Court approved the *Messenger* decision and stated:

Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding “going and coming” rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. [Citations omitted.] Because *Kindel* and other Ferco employees were expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule.<sup>11</sup>

In a more recent decision, the Kansas Court of Appeals in *Brobst* reiterated that accidents occurring while going and coming from work are compensable where travel is either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

. . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.

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<sup>9</sup> *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

<sup>10</sup> *Messenger* at 437.

<sup>11</sup> *Kindel* at 277.

Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968 premises and special hazard amendments to the Workers Compensation Act. [Citations omitted.]<sup>12</sup>

Larson's<sup>13</sup> also recognizes the "inherent travel" exception to the going and coming rule.

Several so-called "exceptions" to the basic premises rule on going and coming are applications of this principle: employees sent on special errands; employees continuously on call; and employees who are paid for their time while traveling or for their transportation expenses. The explanation of these exceptions, and the clue to their proper limits, is found in the principle that the journey is an inherent part of the service.<sup>14</sup>

In *Ridnour*, the Kansas Supreme Court stated:

Kansas case law has recognized several exceptions to the K.S.A. 2004 Supp. 44-508(f) going and coming rule. One such exception provides that injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is required in order to complete some special work-related errand or special-purpose trip in the scope of employment.<sup>15</sup>

The Kansas Supreme Court addressed the so-called dual purpose trip doctrine in *Tompkins*:

Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. . . .<sup>16</sup>

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<sup>12</sup> *Brobst* at 773-74.

<sup>13</sup> 1 Larson's Workers' Compensation Law, § 14.04 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, Syl. ¶ 5, 124 P.3d 87 (2005), rev. denied \_\_ Kan. \_\_ (2006).

<sup>16</sup> *Tompkins v. Rinner Construction Co.*, 194 Kan. 278, 283, 398 P.2d 578 (1965) (quoting Vol. 1, Larson, Workmen's Compensation Law, § 18.0).

Accidental injuries which occur on dual purpose excursions, where the benefit is both to the employer and the employee, are generally ruled compensable.<sup>17</sup> However, the dual purpose rule does not extend to factual situations where the errand would not have been undertaken if the personal errand had been abandoned or postponed.<sup>18</sup>

There is no question but that if claimant was alone traveling to Ingalls School solely to perform an inspection of the food service operation, this accident would be compensable. There are essentially two issues: (1) Was claimant intending to inspect Ingalls School; and, if so, (2) would this business errand have been undertaken if claimant was not also taking her son to school? As to the first issue, the ALJ apparently found claimant credible because she awarded benefits to claimant primarily on the strength of claimant's testimony. As for the second issue, this calls for speculation, as claimant was not specifically asked whether she still would have gone to inspect Ingalls School if she did not need to transport her son there. Although not argued, a third issue is presented if it is found claimant was not intending to inspect the Ingalls School. As claimant indicated that Ingalls was more or less on the way to Sublette, would the trip to Ingalls School to deliver her son constitute such a minor deviation that the trip retained its business purpose?<sup>19</sup>

The Board finds that claimant was on her way to inspect the Ingalls School. But the Board also finds that this inspection was secondary to the personal errand of taking her son to school. The business errand would not have been undertaken at that time and on that date absent the personal errand. Moreover, it may not have been undertaken at all. Accordingly, the dual purpose exception fails. Nevertheless, the trip was on the way to the business errand in Sublette. Although claimant may have taken a different route if she were intending to travel directly from her home to Sublette, the route through Ingalls was a deviation, it was not substantial in its duration, nature or in the distance involved. Accordingly, it was a minor, not a major or significant, deviation. The business purpose was not lost or abandoned.<sup>20</sup> Therefore, the accident arose out of and in the course of claimant's employment with respondent.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated April 11, 2006, is affirmed.

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<sup>17</sup> 1 Larson's Workers' Compensation Law § 16 (2005).

<sup>18</sup> *Tompkins*, *supra* note 15.

<sup>19</sup> See *Foos v. Terminex*, 277 Kan. 687, 89 P.3d 546 (2004); *Kindel v. Ferco*, 258 Kan. 272; and *Sumner v. Meier's Ready Mix*, 34 Kan. App. 2d 850, 126 P.3d 1127 (2006), *rev. granted* May 9, 2006.

<sup>20</sup> *Woodring v. United Sash & Door Co.*, 152 Kan. 413, 103 P.2d 837 (1940); see 1 Larson's Workers' Compensation Law § 17 (2005).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2006.

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BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director